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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 70

IRVING J. WOLF, ROBERT H. DAVIDSON, RICHARD S. HULL and FREDERICK KATZENELL,

Petitioners,

v.

ARNOLD A. WEINSTEIN, JEROME FRIED, NAZARETH FAIRGROUNDS & FARMERS' MARKET, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION OF RESPONDENT JEROME FRIED FOR REHEARING.

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PETITION OF RESPONDENT JEROME FRIED FOR REHEARING.

Respondent Jerome Fried presents his petition for a rehearing insofar as the decision of this Court on April 15, 1963, reversed the judgment of the Court of Appeals, held that this respondent is subject to §249 of the Bankruptcy Act, and that the Debtor is entitled to recoup from him all salary paid him for the past ten years.

I.

This Court has construed §249 of the Bankruptcy Act in such manner as to deprive respondent Fried of due process of law.

Fried maintains that the interpretation of §249 which the Court has reached overlooks an important constitutional limitation. Due process requires a statute to be sufficiently definite to apprise a person of ordinary intelli-

gence whether it applies to him. The Court holds that §249 may or may not apply to a "managing employee" of a Debtor-in-Possession, depending upon "in each case a careful examination of the nature of the particular applicant's activities, powers and responsibilities in connection with the reorganization" (p. 18). The decision thus requires a salaried employee of the Debtor-in-Possession (not a person designated in Article XIII) to make a choice of conduct without the benefit of an objective test. Whether he is in a "fiduciary capacity" within §249 will depend, under the Court's decision, upon whether the Bankruptcy Court subsequently says he is*, upon "a careful appraisal of the relevant facts" (p. 18). The statute, so interpreted, is void for vagueness.

Although phrased as a mere limitation upon the Bankruptcy Court in its allowance of compensation or reimbursement, §249 is actually a drastic penal statute. The Court recognizes the penal character of the section, by its quite natural references (pp. 22, 23) to "a violation of Section 249".

This statute bears no relation to such statutes as §16(b) of the Securities Exchange Act where the mandated loss of profits on the transaction bears a direct relationship to the forbidden dealing in securities. The penalty imposed by §249 is administered in the wholly unrelated field of compensation and reimbursement for expenses. The effect of the statute is the same as if it had forbidden the dealing in stock, and had imposed a fine, variable with the amount to which the applicant would have been entitled for his services, with forfeiture of all moneys laid out in the Debtor's behalf. While not technically a criminal statute**,

* Cf. *Connally* v. *General Const. Co.* (1926) 269 U. S. 385, 395.

** As will be seen, it is not essential that it be a criminal statute in order for the principle here invoked to apply. *Small Co.* v. *American Sugar Refining Co.* (1925) 267 U. S. 233, 239.

the severity of its sanction, recognized by the Court (p. 20) stamps it as a statute highly penal in character. Its impact has been called "tragic"*. Its "Draconian penalty" is highlighted by the impending result in this very case.

Fried had been employed prior to the filing of the petition for reorganization (R. 45), and his salary advanced to $200 per week from January 13, 1956 (R. 38-9). Despite the successful performance of his duties, which the Court concedes (p. 4), he must now return salary earned by the week over the last ten years. In substance, the Court has found Fried guilty of buying and selling a few shares of the Debtor's stock, and for that violation has fined him $86,500. Indeed, few criminal offenses call for so disproportionate a fine.

To meet the test of constitutionality, a statute of this character must set up a standard by which its applicability can be readily ascertained. So far as its reach is confined to the persons entitled to apply for an allowance under article (or sub-chapter) XIII, as the Court of Appeals held, its meaning is definite and certain. However, once the Court has chosen "a broader reading of Section 249" and has ventured "to transcend the bounds of the subchapter" (p. 13) in which §249 is found, it has embarked on an uncharted sea with only the words "fiduciary capacity" as a guide.

No words could be less precise in application. Every agent, in a sense, stands in a fiduciary relation**. The scrubwoman is a fiduciary as to her mop and pail.

To quote Mr. Justice Frankfurter in *SEC* v. *Chenery Corp.* (1943) 318 U. S. 80, 85-6:

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* *Third Avenue Transit Corporation* (S. D. N. Y. 1958) 159 F. Supp. 440, 443.

** Webster's Third New International Dictionary p. 846.

> "But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry."

The Court's answer is a complete admission of the imprecision of the word "fiduciary".

> "In concluding as we do that an officer or a managing employee of a Debtor in possession may be a fiduciary for purposes of §249, we do not mean to suggest that one who holds such a position is *necessarily* within that section. That question requires in each case a careful examination of the nature of the particular applicant's activities, powers and responsibilities in connection with the reorganization. As to certain classes of participants—committee members and attorneys, for example—the very terms of §249 clearly make its sanctions applicable. As to other groups—salaried employees who take no part in the management of the Debtor, for instance—it may be equally clear that §249 was not meant to impose any ban on trading in the Debtor's stock. But in the case of an officer or managerial employee, the question whether the particular applicant is a 'fiduciary' under the statute is one which requires careful appraisal of the relevant facts" (p. 18).

The Court then proceeds to say that the District Court took evidence of respondent Fried's activities and responsibilities and concluded that he was a fiduciary, which finding this Court accepts (p. 19).

The constitutional question, however, is whether, with presumed knowledge of §249*, the employee, in considering a stock purchase, can be required to make "a careful appraisal of the relevant facts" under penalty of loss of

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* Of course, Fried never heard of the statute. Weinstein testified that he had not (R. 463). And that is undoubtedly the situation in most of the cases arising under this section, which has proved a veritable trap for the unwary.

his life's work and entire fortune if he guesses wrong as to what the Bankruptcy Court may find after it has made "a careful appraisal of the relevant facts".

The point becomes even clearer when the Court (footnote p. 18) argues for "a flexible assessment of particular powers and responsibilities rather than a rigid rule of thumb". Even so expert an authority on the Securities Exchange Act as the late Judge Jerome Frank was unable to decide as a matter of law whether a "vice-president" or "comptroller" was an "officer" within §16(b) of the Securities Exchange Act*. Yet the decision of this Court apparently requires this lay respondent, amidst his collection of rents, arrangement of advertising, and overseeing sanitation, at Nazareth (R. 485-9), to perform the much more difficult task of appraising his activities and determining at his peril whether they involve that degree of "fiduciary capacity" which will bring him under §249 as now defined.

To uphold such an application of §249 as constitutional will mean a departure by this Court from its uniform insistence that a statute commanding or prohibiting a course of conduct shall set up a standard comprehensible to, and capable of interpretation by the man in the street. A vague statute is a denial of due process.

Thus, this Court struck down a statute which made it unlawful wilfully "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries", *United States* v. *Cohen Grocery Co.* (1921), 255 U. S. 81, 89; a statute which imposed a penalty for failing to pay the "current rate of wages" in the "locality", *Connally* v. *General Const. Co.* (1926), 269 U. S. 385, 394-5; a statute which prohibited "production of crude oil * * * in

* *Colby* v. *Klune* (2 C. A. 1949) 178 F. 2d 872, 875.

such manner and under such conditions as to constitute waste", *Champlin Rfg. Co. v. Corporation Commission of Oklahoma* (1932), 286 U. S. 210, 242. In *Cramp* v. *Board of Public Instruction* (1961), 368 U. S. 278, in holding invalid a statute requiring an oath completely lacking in "terms susceptible of objective measurement" this Court, per Stewart, J., said (p. 287):

> "We think this case demonstrably falls within the compass of those decisions of the Court which hold that '* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' *Connally* v. *General Construction Co.*, 269 U. S. 385, 391. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453. 'Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula.' *United States* v. *Cardiff*, 344 U. S. 174, 176."

In this instance the Court's interpretation has left the classification of the persons subject to the act shrouded in mist. No salaried employee can tell by any objective test whether or not he is in a "fiduciary capacity". The opinion as much as says that that employee of the Debtor-in-Possession is to be deemed in a "fiduciary capacity" within the meaning of §249 whom the Bankruptcy Court will subsequently determine to be a fiduciary upon "a careful appraisal of the relevant facts". No employee can constitutionally be required to determine whether he is included in the classification upon so completely subjective a test.

As was said by Sutherland, J., in *Connally, supra* (p. 395):

> "The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal."

§249 is severely penal, but the constitutional protection to which respondent Fried is entitled is by no means limited to criminal actions. In *Small Co.* v. *American Sugar Refining Co.* (1925) 267 U. S. 231, which raised in the context of a contract action the same question as *Cohen, supra*, the Court said (p. 239):

> "The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. They have been so construed and applied by other courts in civil proceedings."

Thus, in this case respondent Fried cannot by a vague standard in a wholly subjective test be stripped of his rights to retain a salary meritoriously earned and paid him over the past ten years.

Conclusion.

Fried urges that to avoid an unconstitutional interpretation of §249 this Court, upon reconsideration, should affirm the Court of Appeals and hold that §249 applies only to the persons entitled to apply for an allowance under the other sections of Article XIII and that §249 does not apply to respondent Fried.

Dated: New York, N. Y.,
May 1, 1963.

Respectfully submitted,

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VINCENT P. UIHLEIN
Counsel for Respondent
Jerome Fried.

Certificate of Counsel.

We, Harold Harper and Vincent P. Uihlein, counsel for the above-named respondent Jerome Fried, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Harold Harper

Harold Harper

Vincent P. Uihlein

Vincent P. Uihlein
Counsel for Respondent
Jerome Fried